

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Marcus Cable Associates, LP,)	
)	
Complainant,)	
)	File No. PA 96-002
v.)	
)	
Texas Utilities Electric Company,)	
)	
Respondent.)	

ORDER ON REVIEW

Adopted: July 15, 2003

Released: July 28, 2003

By the Commission:

I. INTRODUCTION

1. In this Order, we deny in all except one respect an application for review¹ of a Cable Services Bureau order² that granted a pole attachment complaint³ filed by Marcus Cable Associates, LP (“Marcus”) against Texas Utilities Electric Company (“TU Electric”)⁴ pursuant to section 224 of the Communications Act of 1934, as amended.⁵ As explained below, we conclude that the Commission has jurisdiction to resolve the Complaint. On the merits, we find the Bureau Order to be well-supported by the non-confidential material contained in the record and consistent

¹ Application for Review, File No. PA 96-002 (filed Aug. 20, 1997) (“Application”).

² *Marcus Cable Associates, LP v. Texas Utilities Electric Company*, Declaratory Ruling and Order, 12 FCC Rcd 10362 (Cable Serv. Bur. 1997) (“Bureau Order”).

³ Complaint and Request for Declaratory Ruling, File No. PA 96-002 (filed July 24, 1996) (“Complaint”).

⁴ TU Electric was the named defendant in the Complaint. *See* Complaint at 1. Subsequently, TU Electric was renamed TXU US Holdings Company, and a newly formed company, Oncor Electric Delivery Company, became the successor-in-interest to the wired assets previously held by TU Electric. *See* Letter from Jonathan L. Wiener, counsel for TU Electric, to William Caton, Secretary, FCC, File No. PA 96-002 (Mar. 4, 2002). To avoid confusion, we will continue to refer to the defendant as “TU Electric.”

⁵ 47 U.S.C. § 224.

with the mandates of section 224. To the extent the Bureau Order ruled on TU Electric's pole attachment agreements other than the parties' Agreement, however, we find it to be overly broad.

II. BACKGROUND

A. The Parties and the Complaint

2. TU Electric is a utility engaged in the generation, purchase, transmission, distribution, and sale of electric energy in Texas.⁶ TU Electric is affiliated with various entities providing telecommunications services within Texas that are using its private easements and rights-of-way.⁷ Marcus is a franchised cable operator that offers video programming services in the Dallas-Fort Worth, Texas metropolitan area.⁸ In addition to its video programming services, Marcus offers fiber optic conductor capacity over the excess capacity of its cable system, on mixed-use, commonly-sheathed fiber optic and coaxial conductors.⁹

3. On November 1, 1995, Marcus and TU Electric entered into a pole attachment agreement ("Agreement").¹⁰ On July 24, 1996, Marcus filed its Complaint with the Commission, challenging the reasonableness of certain provisions in, and actions related to, the Agreement.¹¹ Specifically, Marcus objected to a section of the Agreement that required Marcus to indicate whether it transmitted "data other than a TV signal" through its facilities attached to TU Electric's poles.¹² A positive response required Marcus to obtain a release from each of its non-video customers indemnifying both Marcus and TU Electric in connection with claims arising out of Marcus's or TU Electric's "negligence, strict liability or other fault of any nature."¹³ The release also had to state that non-video services provided by Marcus may not be completely private and may be interrupted, lost or limited for many reasons.¹⁴ Marcus alleged that TU Electric included this section of the Agreement to gain competitively sensitive information to eliminate Marcus's efforts to deploy fiber optic communications facilities and market non-video services, and to

⁶ Supplemental Response, File No. PA 96-002 (filed Dec. 13, 1996) ("Supplemental Response") at 8.

⁷ Supplemental Response at 8-9; Bureau Order, 12 FCC Rcd at 10363-64, ¶ 5.

⁸ Complaint, Declaration of John Pietri ("Pietri Declaration") at 1, ¶ 2.

⁹ Complaint, Pietri Declaration at 1, ¶ 2.

¹⁰ Complaint at 8, ¶ 33, Exhibit 5 (CATV Pole Lease Agreement).

¹¹ Complaint at 3-4, ¶¶ 13-16.

¹² Complaint at 9, ¶¶ 36-40.

¹³ Complaint at 6-8, ¶¶ 25-35, Exhibit 5 at 17-18 & Attachment D; Reply, File No. PA 96-002 (filed Sept. 10, 1996) at 12-13, ¶¶ 31-34.

¹⁴ Complaint at 7, ¶ 26, Exhibit 5, Attachment D.

destroy or interfere with Marcus's non-video customer relationships.¹⁵ Marcus also argued that other provisions in the Agreement (requiring Marcus to indemnify TU Electric, provide insurance coverage, and post a bond for each pole) are more than sufficient to shield TU Electric from liability.¹⁶ In addition, according to Marcus, TU Electric demanded a portion of Marcus's revenue derived from the provision of such non-video services.¹⁷ Finally, in response to the Bureau's request for information,¹⁸ Marcus sought confidential treatment for information in two contracts with third parties.¹⁹ TU Electric requested that the Complaint be denied or dismissed, arguing, *inter alia*, that the Commission does not have jurisdiction over contractual disputes.²⁰

B. Bureau Order and Application for Review

4. The Bureau Order found that: (1) section 224 of the Act provides the Commission with jurisdiction to review the parties' Agreement;²¹ (2) the Agreement's requirements of indemnification and disclosure of non-video transmissions over Marcus's facilities were unreasonable;²² (3) TU Electric's efforts to collect information about, and money for, third-party use of Marcus's cables were impermissible;²³ and (4) Marcus was not entitled to actual and punitive damages.²⁴ The Bureau Order terminated the provisions of the Agreement that were found to be unreasonable, and, more broadly, granted Marcus's request for a declaratory ruling terminating those provisions in all TU Electric pole attachment agreements.²⁵ The Bureau Order further granted Marcus's request to maintain the confidentiality of the copies of its agreements with

¹⁵ Complaint at 7-8, ¶¶ 28, 30, 37.

¹⁶ Complaint at 7, ¶ 29 & n.5; Reply at 10-11, ¶¶ 24-28.

¹⁷ Complaint at 9, 11, ¶¶ 36, 45-47.

¹⁸ Letter from Meredith J. Jones, Chief, Cable Services Bureau, to Paul Glist, Counsel for Marcus, File No. PA 96-002 (Dec. 2, 1996).

¹⁹ Complainant's Response to Bureau's Information Request, File No. PA 96-002 (filed Dec. 18, 1996) ("Response to Information Request"); Request to Withhold Information from Public Inspection, File No. PA 96-002 (filed Dec. 18, 1996) ("Request to Withhold Information").

²⁰ Response to Complaint and Request for Declaratory Ruling, PA No. 96-002 (filed Aug. 22, 1996) ("Response") at 5-7, 10; Supplemental Response at 2-3, 16-17.

²¹ Bureau Order, 12 FCC Rcd at 10365-68, ¶¶ 9-16.

²² Bureau Order, 12 FCC Rcd at 10369-71, ¶¶ 20-24.

²³ Bureau Order, 12 FCC Rcd at 10371-73, ¶¶ 25-27.

²⁴ Bureau Order, 12 FCC Rcd at 10373, ¶ 29.

²⁵ Bureau Order, 12 FCC Rcd at 10373, ¶ 28.

third-party customers.²⁶

5. On August 20, 1997, TU Electric filed an application for review of the Bureau Order, asserting that the Bureau erred by: (1) finding that the Commission has jurisdiction over the Complaint, which TU Electric continues to assert is simply a contractual dispute;²⁷ (2) misinterpreting section 224 of the Act and the holdings of certain Commission orders interpreting that section;²⁸ (3) basing its decision on Marcus's contracts with third parties, which TU Electric never was allowed to review;²⁹ (4) deciding the issues raised in the Complaint without holding a hearing;³⁰ and (5) issuing a declaratory ruling regarding provisions contained in other TU Electric pole attachment agreements.³¹

III. DISCUSSION

A. Jurisdiction

6. The Bureau correctly determined that the Commission has jurisdiction to resolve the Complaint. Section 224 of the Act vests the Commission with authority to regulate the rates, terms, and conditions for attachments by a cable television system or provider of telecommunications service to a pole, duct, conduit, or right-of-way owned or controlled by a utility.³² The Commission further is authorized to adopt procedures necessary to resolve complaints concerning such rates, terms, and conditions,³³ and "where onerous terms or conditions are found to exist on the basis of the evidence, . . . the term[s] or condition[s] may be invalidated."³⁴ The Commission's authority does not supplant that of the local jurisdiction when the issue between the parties is limited to a breach of contract claim that does *not* include an allegation of unjust or unreasonable contractual rates, terms, or conditions.³⁵

²⁶ Bureau Order, 12 FCC Rcd at 10373-6, ¶¶ 30-38.

²⁷ Application at 5-7.

²⁸ Application at 19-22.

²⁹ Application at 7-11.

³⁰ Application at 12, 14.

³¹ Application at 19.

³² 47 U.S.C. § 224(b)(1).

³³ 47 U.S.C. § 224(b)(1).

³⁴ *Amendment of Rules and Policies Governing the Attachment of Cable Television Hardware to Utility Poles*, Memorandum Order and Opinion on Reconsideration, 4 FCC Rcd 468, 471, ¶ 26 (1989).

³⁵ *Alabama Cable Telecommunications Ass'n v. Alabama Power Co.*, Order, 16 FCC Rcd 12209, 12217, ¶ 18 (2002), *review denied sub nom. Alabama Power Co. v. FCC*, 311 F.3d 1357 (11th Cir. 2002), *petition for cert. filed*,

7. In response to Marcus's claim that certain provisions and conditions attendant to the Agreement were unreasonable, TU Electric asserted that the "real dispute" before the Bureau was whether Marcus violated its contract by subleasing its pole attachment rights (*i.e.*, allowing a party to "overlash" its facilities to Marcus's facilities), and that this issue is beyond the purview of the FCC.³⁶ After reviewing the record, including supplemental information provided by Marcus, the Bureau disagreed with TU Electric that the issues in the complaint pertained exclusively to the subleasing provisions of the contract.³⁷ The Bureau instead determined that the Complaint involved questions regarding the reasonableness of the Agreement's terms and conditions, as well as the reasonableness of TU Electric's request for additional payment regarding revenue from non-video services.³⁸ The Bureau also concluded that two Commission-level decisions squarely addressed similar issues in pole attachment complaint proceedings, and affirmed the agency's jurisdiction.³⁹

8. In its Application, TU Electric adheres to its view that the Commission lacks jurisdiction to resolve the Complaint.⁴⁰ TU Electric insists that, by concluding that there was no third-party overlashing (and thus no breach of the Agreement), the Commission necessarily decided a matter of contract over which it lacked jurisdiction.⁴¹ We disagree. The Complaint expressly challenges the reasonableness of the terms and conditions of Marcus's attachments to TU Electric's poles.⁴² TU Electric's focus on the issue of "breach" is misplaced. Regardless of whether the Agreement technically was breached – and regardless of whether the fee TU Electric consequently imposed is termed "restitution" or an "excessive rate"⁴³ – the Complaint's

71 U.S.L.W. 3653 (U.S. Apr. 4, 2003) (No. 02-1474) ("*Alabama Power*"). *See also Southern Co. Servs. Inc. v. FCC*, 313 F.3d 574, 583 (D.C. Cir. 2002) ("*Southern Company*") (upholding the Commission's jurisdiction to resolve disputes over the terms and conditions of existing contracts).

³⁶ Response at 1-7, Declaration of Robert L. Ewing at 1-2, ¶ 3; Supplemental Response at 2, 5-7; Application at 12-13, 21.

³⁷ Bureau Order, 12 FCC Rcd at 10366, ¶¶ 11-12.

³⁸ Bureau Order, 12 FCC Rcd at 10366, 10372, ¶¶ 11-12, 26.

³⁹ Bureau Order, 12 FCC Rcd at 10366-68, ¶¶ 12-16.

⁴⁰ Application for Review at 5-7.

⁴¹ Application at 6-7.

⁴² *See, e.g.*, Complaint at 6-12, ¶¶ 24-50 (alleging that the provisions of the Agreement requiring (1) disclosure of information relating to Marcus's customers; (2) execution of releases by its customers; and (3) payment of a portion of non-video revenue are unreasonable terms and conditions under section 224).

⁴³ *See* note 45, *infra*

allegations of unreasonableness fall squarely within the Commission's jurisdiction.⁴⁴ Stated differently, the description of the fee does not affect the Commission's jurisdiction, and the Bureau was correct to review the fee and determine its justness and reasonableness under the Act.⁴⁵

B. Third-Party Overlashing

9. TU Electric argues that the Bureau incorrectly concluded that Marcus did not engage in third-party overlashing.⁴⁶ Specifically, TU Electric contends that the Bureau improperly based its factual finding on contradicted and conclusory complaint allegations and on evidence that TU Electric was not allowed to review.⁴⁷ Moreover, TU Electric contends that the Bureau wrongly shifted the burden of proof to TU Electric and refused to hold a hearing.⁴⁸ We reject TU Electric's assertions as unsupported by the record.

10. The facts in the record on this issue are as follows: TU Electric found that in two places a third-party, non-video provider had installed a handhole⁴⁹ at the base of one of TU Electric's distribution poles, with a conduit extending to a conduit riser attached to the pole.⁵⁰ In both locations, a fiber optic cable extends from the handhole, up the riser, and is overlashed to Marcus's primary cable that is attached to TU Electric's pole.⁵¹ This discovery caused TU Electric to question whether the overlashed cable or other fiber cable was wholly owned by

⁴⁴ 47 U.S.C. § 224(b).

⁴⁵ See, e.g., *Mile Hi Cable Partners v. Public Service Company of Colorado*, Order, 17 FCC Rcd 6268, 6270, ¶ 7 (2002) (the Commission had jurisdiction where the issue was "not whether the Complainant failed to pay an invoice based on a just and reasonable term or condition, but whether the term or condition itself was reasonable"), *petition for review filed sub nom. Public Service Co. of Colorado v. FCC*, No. 02-1163 (D.C. Cir. May 24, 2002).

⁴⁶ Application at 7-13.

⁴⁷ Application at 7-13. As part of this argument, TU Electric contends that the Bureau erroneously determined that the fee TU Electric charged Marcus for Marcus's alleged overlashing was an unreasonable term and condition of attachment, rather than "restitution" for breach of contract. Application at 13-14. Again, notwithstanding TU Electric's nomenclature, this case is not simply a contract dispute. The Bureau correctly concluded that the fee was a term and condition of attachment and, accordingly, that the Commission appropriately assessed the justness and reasonableness of the fee. 47 U.S.C. § 224(b).

⁴⁸ Application at 7-13.

⁴⁹ A handhole is "[a]n access opening, provided in equipment or in a below-the-surface enclosure in connection with underground lines, into which personnel reach but do not enter, for the purpose of installing, operating, or mainlining equipment or cable or both." National Electric Safety Code at 7 (1997 ed.).

⁵⁰ Complaint, Exhibit 9 (Letter from Robert L. Ewing, Distribution Planning Manager, TU Electric, to Marcus (May 20, 1996)).

⁵¹ Complaint, Exhibit 9.

Marcus, and whether it was being used or leased by third parties.⁵² Marcus submitted the Pietri Declaration, which states that Marcus provides non-video services, “typically fiber optic conductor capacity . . . over the excess capacity of its cable television system, on mixed use, commonly sheathed fiber and coaxial conductors.”⁵³ In response to nine interrogatories propounded by the Bureau, Marcus specified precisely the type of capacity it provides over its network, and stated categorically that it wholly owns all facilities it attaches to TU Electric poles.⁵⁴ Marcus further explained how long fiber optic cable it owns had been overlashed pursuant to permits obtained by Marcus’s predecessor-in-interest, and confirmed that it has not entered any agreements permitting a third party to attach to TU Electric’s poles.⁵⁵

11. Given this record, the Bureau reasonably concluded that Marcus had met its burden of demonstrating that it wholly owned the overlashed cable.⁵⁶ Marcus’s assertions were fully supported by affidavit, and TU Electric did not provide any contradictory evidence. Thus, there was ample basis to find that Marcus had not engaged in third-party overlashing, which was the basis for TU Electric’s claim that Marcus had breached the Agreement’s non-assignment clause.⁵⁷

12. We further reject TU Electric’s argument that the Bureau Order improperly relied on confidential documents provided by Marcus in response to the Bureau’s request for information. The Bureau based its conclusion that Marcus wholly owned the overlashed cable exclusively on the substantial, non-confidential evidence in the record.⁵⁸ In other words, the Bureau *did not rely* on the confidential documents in reaching its conclusion.⁵⁹

13. TU Electric contends that the Bureau impermissibly shifted the burden of proof

⁵² Complaint, Exhibit 9.

⁵³ Complaint, Pietri Declaration at 1, ¶ 2.

⁵⁴ Response to Information Request at 1-2.

⁵⁵ Response to Information Request at 2-3.

⁵⁶ Bureau Order, 12 FCC Rcd at 10366, ¶¶ 11-12.

⁵⁷ Because Marcus did not allow a third-party to overlash its cable, it was not necessary for the Bureau to determine the reasonableness of the non-assignment provision. *See Implementation of Section 703(e) of the Telecommunications Act of 1996*, Consolidated Partial Order on Reconsideration, 16 FCC Rcd 12103, 12141, ¶ 75 (2001) (“*Reconsideration Order*”), *aff’d Southern Company*, 313 F.3d at 574.

⁵⁸ Complaint, Pietri Declaration at 1, ¶ 2; Response to Information Request at 1-4.

⁵⁹ *See* Bureau Order, 12 FCC Rcd at 10366, ¶¶ 11-12. TU Electric also argues that Marcus did not adequately support its request for confidential treatment. Application at 8-10. In any event, because the Bureau did not rely on the confidential information, we need not repeat the lengthy discussion contained in the Bureau Order and its analysis of this issue. *See* Bureau Order, 12 FCC Rcd at 10373-77, ¶¶ 30-38.

on the overlashing and other issues to TU Electric.⁶⁰ We disagree. Once a complainant in a pole attachment matter meets its burden of establishing a *prima facie* case, the respondent bears a burden to explain or defend its actions.⁶¹ Thus, when Marcus proved as a matter of fact that it had not permitted third-party overlashing,⁶² TU Electric was required to come forth with some evidence to support its assertion that Marcus's contentions were wrong as a factual matter. As discussed above, TU Electric offered no evidence refuting Marcus's claims. The Bureau's use of phrases such as "failed to make a sufficient showing"⁶³ indicates a failure of TU Electric to meet its burden of production rather than a shift in the ultimate burden of proof.

14. Finally, we reject TU Electric's contention that it was entitled to a hearing. The pole attachment process is designed to be efficient but allow all parties to express fully their positions, and the decision to grant an evidentiary hearing is discretionary.⁶⁴ In this matter, both parties submitted extensive pleadings, affidavits, and exhibits to explain their respective positions.⁶⁵ The Bureau found that the material facts available in the record in written form were sufficient to support its decision, and we agree.⁶⁶ Moreover, TU Electric has not identified "a

⁶⁰ Application at 3, 12-18. In addition to the overlashing issues, TU Electric claims it wrongly was assigned the burden of proof on the reasonableness of the Agreement's disclosure and indemnification provisions. We discuss this contention *infra*, section III.D.

⁶¹ See *Adoption of Rules for the Regulation of Cable Television Pole Attachments*, First Report and Order, 68 FCC2d 1585, 1598, ¶ 40 (1978); 47 C.F.R. §§ 1.407, 1.1404(j), 1.1409(a); cf. *Implementation of the Telecommunications Act of 1996, Amendment of Rules Governing Procedures to Be Followed When Formal Complaints Are Filed Against Common Carriers*, Report and Order, 12 FCC Rcd 22497, 22617, ¶ 295 (1997) (subsequent history omitted) (it is "incumbent upon a defendant . . . to respond fully to any *prima facie* showing made by a complainant, with full legal and evidentiary support").

⁶² See Bureau Order, 12 FCC Rcd at 10366, ¶¶ 11-12; Complaint, Pietri Declaration at 1, ¶ 2; Response to Information Request at 1-3.

⁶³ Bureau Order, 12 FCC Rcd at 10371, ¶ 24; Application at 17.

⁶⁴ *Alabama Power*, 311 F.3d at 1371; see 47 C.F.R. § 1.1407 (" . . . no other filings . . . will be considered unless authorized by the Commission"); 47 C.F.R. § 1.1411 ("The Commission may decide each complaint upon the filings and information before it, may require one or more informal meetings with the parties to clarify the issues or to consider settlement of the dispute, or may, in its discretion, order evidentiary procedures upon any issues it finds to have been raised by the filings.").

⁶⁵ In addition to the Agreement, Marcus submitted representative invoices and correspondence with TU Electric relating to the Agreement, as well as declarations of Marcus's Senior Vice President, Vice President of Engineering and Technology, and counsel regarding efforts to negotiate contract terms with TU Electric. See Complaint, Exhibits 1-10 and declarations attached thereto; Reply, Exhibit 2 and declaration attached hereto. Further, Marcus responded in writing under oath to questions propounded by the Bureau and provided certain franchise materials with respect to its provision of non-video data capacity to local governments. Response to Information Request and attachment thereto. In conjunction with its Response, TU Electric submitted four declarations as well as correspondence relating to the execution of the Agreement. Response, Appendices A-E.

⁶⁶ Bureau Order, 12 FCC Rcd at 10366, ¶¶ 11-12.

material question of fact that warrants a hearing.”⁶⁷ Consequently, we find that the Bureau did not err in declining to hold a hearing.

⁶⁷ *Alabama Power*, 311 F.3d at 1372.

C. Leasing of Excess Capacity

15. In its Application, TU Electric argues that the Bureau erred in concluding that the terms and conditions of the Agreement with respect to leased capacity to a telecommunications provider are unjust and unreasonable, because it based its conclusions on a pre-Telecommunications Act of 1996 (“1996 Act”)⁶⁸ interpretation of section 224.⁶⁹ In this regard, TU Electric states: “While a telecommunications carrier may now also have the right to pole attachments from a utility and, if it does not already have an agreement, secure a regulated rate, that is the right of a telecommunications carrier, not a cable system wishing to sublease one.”⁷⁰ As TU Electric notes, at the time of the Bureau decision the Commission had not itself addressed whether the 1996 Act should be interpreted to “allow (*e.g.*, force utilities to permit) systems with attachment rights to let unrelated telecommunications carriers overlash their cables to existing systems.”⁷¹ TU Electric argues that section 224 applies only to attachments for services offered by the attacher itself (here, Marcus) and not to attachments that are used to allow third parties to provide services, because “[s]uch subleasing of capacity clearly is not encompassed within Section 224.”⁷²

16. The Commission subsequently decided that section 224 does indeed apply to leased capacity:

We affirm our holding in the *Telecom Order* that if an attachment previously used for providing solely cable services would, as a result of the leasing of dark fiber, also be used for providing telecommunications services, the rate for the attachment would be determined using the *Telecom Formula*. However, attaching entities may lease their dark fiber to third parties without such leases being considered separate attachments and without making an additional payment beyond the host’s existing attachment rate. The cable system operator may lease excess fiber capacity within its existing attachment to any party for a negotiated rate without the knowledge or consent of the pole owner because the physical attachment will not

⁶⁸ Pub. L. No. 104-104, 110 Stat. 56 (1996).

⁶⁹ See *Heritage Cablevision Assoc. of Dallas v. Texas Util. Elec. Co.*, Memorandum Opinion and Order, 6 FCC Rcd 7099 (1991), *recon. denied*, 7 FCC Rcd 4192 (1992), *aff’d sub nom. Texas Util. Elec. Co. v. FCC*, 997 F.2d 925 (D.C. Cir. 1993) (“*Heritage Cablevision*”). In *Heritage Cablevision*, the Commission determined that the jurisdiction conferred by section 224 extended to pole attachments that carry non-video services in addition to traditional cable video services. *Heritage Cablevision*, 6 FCC Rcd at 7107, ¶ 39.

⁷⁰ Application at 20.

⁷¹ Application at 21.

⁷² Application at 21.

be altered. The dark fibers contained within the attaching host have already been taken into account in determining the rent for the attachment. The character and content of the services provided do not affect the amount of space occupied by the attachment. The type of services provided over the attachment only affect the pole attachment rate if the services are telecommunications services. If the third party leasing the fiber is, or becomes, a telecommunications carrier, then the utility is entitled to compensation for the pole attachment based on the *Telecom Formula* and must be notified.⁷³

D. Information and Indemnity Requests

17. We reject TU Electric's argument that the Bureau had insufficient evidence to find that the requirements of Section 13.1A of the Agreement were unreasonable.⁷⁴ Section 13.1A requires disclosure of information regarding non-video services and mandates that customers of non-video services execute indemnity and release agreements in favor of TU Electric.⁷⁵ We concur with the Bureau's conclusion that, beyond an indication that a pole is being used for the provision of telecommunications services, the requirements of section 13.1A requiring identification of non-video customers and their location on Marcus' system appear to be a thinly-veiled attempt to undermine the provision of telecommunications services offered by actual or potential competitors and are unreasonable.⁷⁶ Further, as the Bureau determined, TU Electric already is adequately indemnified by Marcus for liability arising out of Marcus's attachment to TU Electric poles.⁷⁷ Whether or not Marcus seeks indemnity from its third-party customers, TU Electric is protected by the Agreement.⁷⁸ Consequently, the Bureau rightly found that the indemnity requirement in Section 13.1A is unnecessary to protect TU Electric's interests and therefore is unreasonable.⁷⁹ In addition, contrary to TU Electric's assertion, the Bureau did not shift the ultimate burden of proof regarding disclosure and indemnity to TU Electric. Marcus established that the provision was unnecessary in light of the Agreement's general indemnity provision.⁸⁰ TU Electric failed to persuade the Bureau that there was a reason to require the

⁷³ *Reconsideration Order*, 16 FCC Rcd at 12146, ¶ 86.

⁷⁴ Application at 15-18.

⁷⁵ Bureau Order, 12 FCC Rcd at 10368, ¶ 17.

⁷⁶ Bureau Order, 12 FCC Rcd at 10370-71, ¶¶ 22-23.

⁷⁷ Bureau Order, 12 FCC Rcd at 10369-70, ¶ 20.

⁷⁸ Bureau Order, 12 FCC Rcd at 10369-70, ¶ 20.

⁷⁹ Bureau Order, 12 FCC Rcd at 10369-70, ¶ 20.

⁸⁰ See Complaint at 7, ¶ 29 & n.5; Reply at 9-11, ¶¶ 23-28 & Exhibit 5.

additional indemnification.⁸¹

18. Finally, TU Electric asserts that it was inappropriate for the Bureau to issue a declaratory ruling affecting multiple TU Electric agreements.⁸² In addition to invalidating the notice, information and indemnification requirements contained in Section 13.1A of the parties' Agreement, the declaratory ruling invalidates those provisions in *all* TU Electric pole attachment agreements.⁸³ TU Electric argues that the section 224 adjudicatory process is geared to the resolution of specific factual claims in specific factual circumstances, and that it is not proper for the Bureau to make a sweeping determination affecting agreements that the Commission has not seen and parties that are not before it.⁸⁴ TU Electric further contends that because the indemnification provision in Section 13.1A allows individual companies affected by the provision to reach agreement with TU Electric as to alternative provisions, which may be acceptable to both parties, the Bureau should not have issued a declaratory ruling.⁸⁵ We find that the Bureau did not have adequate record for issuing its declaratory ruling on this issue insofar as it pertains to TU Electric's pole attachment agreements other than the parties' Agreement. In sum, there is an insufficient record in this case to warrant a determination applicable to agreements and parties that are not presently before the Commission.

⁸¹ Cf. paragraph 13, *supra*.

⁸² Application at 19.

⁸³ Bureau Order, 12 FCC Rcd at 10373, ¶ 28.

⁸⁴ Application at 19.

⁸⁵ Application at 19.

IV. ORDERING CLAUSE

19. For the reasons discussed above, IT IS ORDERED, pursuant to section 1.115 of the Commission's rules, 47 C.F.R. § 1.115, that the Application for Review of *Marcus Cable Associates, LP v. Texas Utilities Electric Company*, Declaratory Ruling and Order, 12 FCC Rcd 10362 (Cable Serv. Bur. 1997), IS GRANTED to the extent indicated above and in all other respects, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary